over to the insurance company when, in fact, there were no such notes.

- The lower courts failed to note that Dr. Ketzner had been granted U.S. social security benefits for total disability.
- Although requested by Dr. Ketzner, no jury trial was ever held.

REASONS FOR GRANTING THE WRIT

A. The Text of Our Country's Founding Documents, their History, and Precedent Recognize the Right to a Trial by Jury.

The Declaration of Independence stated as one of the principal complaints against the King of England that he had "deprive[ed] us, in many cases, of the benefits of Trial by Jury." The Declaration of Independence para. 20, *quoted in Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 341 (U.S. 1979) (Rehnquist, J., dissenting).

The Seventh Amendment states, in pertinent part, that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]" U.S. Const., amend. VII.

The jury trial is a check on the abuse of power. *Parklane*, 439 U.S. at 343 (Rehnquist, J., dissenting). A primary grievance of the American colonists was the extensive effort by England to shift the adjudication of civil and criminal disputes from colonial courts, where independent local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. *Id.* at 340-41 (Rehnquist, J., dissenting). *See generally id.* at 338-43 & nn.1-9 (Rehnquist, J., dissenting) (detailing history of right to civil

jury trial).[3] The absence of an express guarantee of the right in civil actions in the proposed Constitution was condemned by the Anti-Federalists as sufficient cause to reject the entire Constitution, leading to the adoption of a Bill of Rights, which was a condition of ratification of

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[3] The following quotations, collected in *In Defense of Trial by Jury*, volumes I and II, by the American Jury Trial Foundation (1993), illustrate the historical significance of the right to trial by jury: George Washington (1788): "There was not a member of the Constitutional Convention who had the least objection to what is contended for by the advocates for a Bill of Rights and trial by jury."; John Adams (1774): "Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds."; Thomas Jefferson (1788): "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."; (1801): "Trial by jury is part of that bright constellation which has gone before us and guided our steps through an age of revolution and reformation."; (1801): "The wisdom of our sages and the blood of our heroes has been devoted to the attainment of trial by jury. It should be the creed of our political faith."); James Madison (1789): "Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."; John Quincy Adams (1839): "The struggle for American independence was for chartered rights, for English liberties, for trial by jury, habeas corpus and magna carta."; Patrick Henry (1788): "Trial by jury is the best appendage of freedom by which our ancestors have secured their lives and property. I hope we shall never be induced to part with that excellent mode of trial."; Alexander Hamilton (1788): "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."; Daniel Webster (1848): "The protection of life and property, habeas corpus, trial by jury, the right of an open trial, these are principles of public liberty existing in the best form in the republican institutions of this country."; and David Hume (1762): "Trial by jury is the best institution calculated for the preservation of liberty and the administration of justice that was ever devised by the wit of man."

the Constitution itself. *Parklane*, 439 U.S. at 342 (Rehnquist, J., dissenting); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 450 (1996) (Scalia, J., dissenting).

This Court has consistently recognized the right to civil jury trials. *Jacob v. New York*, 315 U.S. 752, 752-53 (1943); *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939); *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872).

B. A Recent, Comprehensive Empirical Study Demonstrates that the Seventh Amendment's Guarantee of a Trial by Jury Is Not Being Protected.

In November 2004, the Journal of Empirical Legal Studies ("JELS") published a study entitled *The Vanishing Trial*. As summarized in the study's forward:

> Is the trial an endangered species in our courts? Are the number of trials declining and, if so, why? And should we care?
>
> The American Bar Association Section of Litigation undertook a major project to answer these questions under the leadership of the Section's Civil Justice Initiative, chaired by Professors JoAnne Epps of Temple University, Steve Landsman of DePaul University, and Bob Sayler of the University of Virginia. "The Vanishing Trial" project is the largest single initiative the Section has ever funded. We set out to document, and then to analyze, what many of us knew anecdotally from our own practices—that old-fashioned trials are an increasingly rare beast.

Patricia Lee Refo, *The Vanishing Trial*, 1 J. Empirical Legal Stud. v (2004).

The JELS study, which is available at *http://www.blackwell-synergy.com/toc/jels/1/3*, includes: Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004); Steven B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. Empirical Legal Stud. 571 (2004); Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591 (2004); Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. Empirical Legal Stud. 627 (2004); Shari Seidman Diamond & Jessica Bina, *Puzzles about Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. Empirical Legal Stud. 637 (2004); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. Empirical Legal Stud. 659 (2004); Lawrence M. Friedman, *The Day Before Trial Vanished*, 1 J. Empirical Legal Stud. 689 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. Empirical Legal Stud. 705 (2004); Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. Empirical Legal Stud. 735 (2004); Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. Empirical Legal Stud. 755 (2004); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. Empirical Legal Stud. 783 (2004); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. Empirical Legal Stud. 843 (2004); Elizabeth Warren,

Vanishing Trials: The Bankruptcy Experience, 1 J. Empirical Legal Stud. 913 (2004); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. Empirical Legal Stud. 943 (2004); *Stephan Landsman, So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Stud. 973 (2004).

Petitioner requests that this Court give the JELS study the type of weighty consideration it has accorded to empirical work in the past. *Brown v. Board of Educ.*, 347 U.S. 483, 493 & n.11 (1954); *Muller v. Oregon*, 208 U.S. 412, 419-222 & n.1 (1908).

C. This Court Should Grant Review To Resolve a Split in the Circuits Concerning the Right to a Civil Jury Trial.

Relying on this Court's precedent, the United States Court of Appeals for the Second Circuit recently reaffirmed the right to a civil jury trial. *Pereira v. Farace*, ___ F.3d ___, No. 03-5053, 2005 WL 1532318, at *5, *9 (2d Cir. June 30, 2005). The Second Circuit reversed a lower court's ruling that had denied the defendants' request for a civil jury trial. *Id.* at *9. Here, Dr. Ketzner requested a jury trial. That request was denied by the District Court, the Court of Appeals, and the Court of Appeals en banc.

The decision of the Second Circuit in *Pereira* upholding the right to a civil jury trial for those defendants contradicts the decision of the Third Circuit in this case denying a civil jury trial to Dr. Ketzner. This Court should grant review to resolve the split between the Second and Third Circuits regarding the right to a civil jury trial. *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

D. This Court Should Grant Review To Resolve a Split *Within* the Third Circuit.

Curiously, Dr. Ketzner's case involves a split *within* the Third Circuit. Since denying Dr. Ketzner's Petition for Rehearing and Rehearing en banc, the Third Circuit allowed RICO and similar claims to go forward against a corporate affiliate of respondents under very similar factual circumstances. *See* Judgment Order in *Weiss v. First Unum Life Ins. Co.*, No. 04-2021, dated June 14, 2005, a copy of which is included as Appendix C. This Court should consider resolving that "conflict in the rulings" of the Third Circuit. *John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939). *See generally* Robert L. Stern et al., *Supreme Court Practice*, § 4.6 (8th ed. 2002).

E. This Court Should Grant Review To Decide a Significant Question Concerning When Granting Summary Judgment Violates the Right to a Civil Trial by Jury.

The decisions below show a judicial distrust of and disfavor for juries. Dr. Ketzner was entitled to have her peers assess the dispositive factual issues that were disputed by the parties. *O'Riordan v. Federal Kemper Life Assurance*, No. S115495, 2005 WL 1579741, at * 5 (Cal. July 7, 2005). The American Bar Association ("ABA") recently has stated that "[t]he [r]ight to [j]ury [t]rial [s]hall [b]e [p]reserved."[4] Dr. Ketzner raised before the Third Circuit panel and in her Petition for Rehearing and Rehearing en banc that, when the lower courts improperly

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[4] *See http://www.abanet.org/juryprojectstandards/principles.pdf*, at 1, dated August 2005. The quoted text is Principle 1 of a document entitled "Principles of Juries and Jury Trials." Each such Principle, including Principle 1, was adopted as ABA policy in February 2005. *Id.* at v.

granted summary judgment, she was deprived of her right to a civil jury trial. This Court should grant review to consider whether such an application and affirmance of summary judgment contravenes the aspirations of the Declaration of Independence and violates the Seventh Amendment. *Cf. Galloway v. United States*, 319 U.S. 372, 411 (Black, J., dissenting) (1943) (remarking that grant of directed verdict against petitioner in claim for total and permanent disability benefits violated Seventh Amendment).

CONCLUSION

Dr. Helen Ketzner respectfully requests that this Court grant her Petition for Writ of Certiorari.

August 9, 2005

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 03-4870

Submitted Under Third Circuit
LAR 34.1(a) Dec. 6, 2004

Decided Dec. 17, 2004

HELEN KETZNER, M.D.,

Appellant,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; PROVIDENT LIFE INSURANCE COMPANY.

Eugene R. Anderson, Anderson, Kill & Olick, New York, NY, for Appellant.

Jonathan O. Bauer, Robert F. Pawlowski, Anderson, Kill & Olick, Newark, NJ, *Peter J. Heck, Steven P. Del Mauro,* McElroy, Deutsch, Mulvaney & Carpenter, Morristown, NJ, for Appellees.

Before: RENDELL and FISHER, Circuit Judges,
and YOHN,* District Judge.

OPINION OF THE COURT

RENDELL, Circuit Judge.

Appellant Doctor Helen Ketzner brought this suit against Appellees John Hancock Mutual Life Insurance Company ("Hancock") and Provident Life Insurance Company ("Provident") asserting a panoply of claims arising from the processing of Appellant's claims on a disability insurance policy she had purchased from Hancock. After several years of motions and discovery disputes, the District Court granted Appellees' motion for summary judgment on all counts. On appeal, Appellant argues that the District Court erred in dismissing her claims for bad faith, declaratory judgment, and breach of contract, and in denying her leave to amend her complaint to add causes of action for post-complaint bad faith, malicious abuse of process, and RICO violations.

The District Court had jurisdiction over this diversity of citizenship action under 28 U.S.C. § 1332, and we have jurisdiction under 28 U.S.C. § 1291. Because we believe the District Court provided more than adequate reasoning to justify sound conclusions, we will affirm its judgment.

I.

In the fall of 1997, Ketzner was working as an internist for HIP Health Plan of New Jersey, a health

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* Honorable William H. Yohn, Jr., Senior District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

maintenance organization. Although she had been experiencing problems since she began working at HIP, by November 1997 she had become overwhelmed. She was feeling tense in dealing with patients and had been threatened by some of them. Her concentration was poor, she was losing weight, and she "derived little enjoyment from anything." In mid-November 1997, Ketzner stopped working.

Ketzner alleged that she left her job at HIP because of a medical disability, dysthymic depression, and the essence of her initial claim in this litigation was that she had not received the full benefits entitled to her for this disability under a disability income insurance policy she had purchased from Hancock that was administered by Provident.[1]

Problems with Ketzner's claim on the policy developed from the very beginning: she alleged that she gave Appellees notice of her disability claim as early as December 1997, but Appellees contended that they first received notice regarding the claim on January 12, 1998. This miscommunication was, unfortunately, the first in a series of miscommunications and disputes that spanned several months of increasingly tense dealings between Ketzner and Appellees. We note that these incidents are

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[1] Ketzner purchased her first disability income insurance policy from Hancock in 1980. The noncancellable policy was to provide "disability income protection if [Ketzner] were injured or ill and not able to perform the material duties of her occupation." On July 22, 1991, Hancock reissued the policy in light of a premium reduction. Pursuant to an agreement entered into on July 30, 1992, Provident assumed responsibility for adjudicating claims under the policy. Under this agreement, Provident was " 'solely responsible for performing all claim administration, as well as funding the payment of benefits, and John Hancock did not participate in the adjudication or payment of benefits under the policy of disability income insurance.' "

well documented by the parties and the District Court in the record; consequently, we will make only sparing and necessary reference to them here.

By March 27, 1998, Appellees had received from Ketzner a completed "Statement of Claim" form, required to process her claim. Accompanying this form was an "Attending Physicians Statement," signed by Ketzner's therapist, Marsha K. Ontell, on March 6, 1998, and by one of Ketzner's physicians, Dr. Campion, on March 17, 1998. This form, also required to process Ketzner's claim, was to be completed by an attending doctor for the purpose of giving an opinion regarding Ketzner's "degree of disability," but it appeared to have been completed by Ontell, the primary signatory, or Ketzner herself rather than by Dr. Campion. In this form, Ketzner was diagnosed with "dysthymic depression r/o major depression,"[2] with symptoms first appearing on November 13, 1997, and treatment for this "total disability," provided by Ontell, beginning the next day. (App. at 53a.) The form also stated that Ketzner had previously suffered from depressive episodes and had been treated for her symptoms by Ontell with therapy sessions twice a week since November 1997.

The majority of the parties' miscommunications and tense encounters occurred during the period of April to October 1998. During this time, as they were investi-

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[2] The District Court explained this diagnosis in a footnote:

> Dysthymia is a disorder similar to clinical depression but with milder symptoms and is longer-lasting. It is considered less disabling than major depression. Although the disorder lasts for at least two years, those affected are usually able to go on working and do not need hospitalization. Also "r/o" is a widely accepted medical abbreviation for "rule out." Therefore it appears that Dr. Ketzner was diagnosed as having dysthymia, and major depression was ruled out.

gating Ketzner's claim, Appellees sent a variety of supplementary forms to Ketzner and her health care providers and specifically requested Ontell's notes regarding her treatment and evaluation of Ketzner. Ketzner, taxed by what she describes as "endless questions and forms" and "continuing harassment," was at times too overwhelmed to deal productively with Appellees, and eventually she retained an attorney to represent her in dealing with Appellees. In response to Appellees' request for treatment notes, Ontell had submitted a detailed medical history on her therapy sessions with Ketzner, but did not submit a copy of her treatment and evaluation notes. Ontell also asked that Appellees not contact Ketzner directly as such contact tended to upset Ketzner. At one point, Ketzner offered to see a psychiatrist to expedite the processing of her claim. Appellees instead requested that Ketzner meet with one of their field representatives for an interview to aid in their information gathering.

After several failed attempts to arrange the interview, on October 13, 1998, Ketzner finally met with a field representative to discuss her claim. At the interview, Ketzner complained of its harassing nature and debated with the representative over whether Ketzner could audiotape the discussion; eventually Ketzner did record the conversation. Regarding her treatment, Ketzner stated that she did not require medication, a statement that contradicted Dr. Campion's diagnosis, but admitted receiving prescription medication, including Paxil, Prozac, and Zoloft, from a psychiatrist she would not identify. After the interview, the representative concluded that numerous questions remained unanswered regarding whether a disability existed, the severity of any disability, and a diagnosis. The representative also noted that Ketzner was generally uncooperative and did

not forward a copy of the tape she had made despite the representative's requests.

Two days after the interview, Appellees referred Ketzner's disability file for a second medical review. A review was conducted shortly thereafter and concluded that based on the contradictions, ambiguities, and unsubstantiated diagnoses in the materials submitted by Ketzner and her treatment providers, a "diagnosis of major depression was 'clearly not substantiated.' " The review also stated that an independent medical examination may be necessary.

Toward the end of October 1998, Ketzner's attorney sent a letter to Appellees outlining the perceived mishandling of Ketzner's claim and demanded payment within 30 days under threat of suit. Appellees responded that they had still not received Ontell's treatment notes or a copy of the audiotape of the interview with the field representative, claiming both were necessary to complete the processing of Ketzner's claim. The letter also stated that a thorough review of the materials submitted indicated that Ketzner's disability claim was unsubstantiated and, unless the requested information were submitted within 30 days, the claim would be denied and the case would be closed.

Shortly after this correspondence, Appellees received a psychiatric summary from a Dr. Williams, which further clouded the medical information regarding Ketzner's condition, stating that Ketzner " 'displayed no cognitive impairment. Insight and judgment were adequate,' " but that Ketzner suffered from major depression and required antidepressant medication.

In November 1998, Ketzner's counsel again wrote to Appellees to explain: why he thought they were acting in bad faith, that Ontell's notes did not exist, and that the request for the audiotape was puzzling since the inter-

view was taped by Ketzner and the field representative did not see the need to tape it. Appellees responded that they believed the notes existed because Ontell had earlier represented that she would not release them. At this time, Appellees determined that a complete independent medical examination of Ketzner was necessary to complete their evaluation of her claim, and as a showing of good faith, Appellees paid Ketzner three months of benefits.

By the end of December, Ketzner had appointments to be examined by Drs. Nancy and David Gallina for the independent medical examination. The reports of these examinations were filed in mid-January 1999, and, based on these reports, Appellees denied Ketzner's claim for disability benefits in mid-March 1999. This litigation began after the denial of the claim.

During the litigation, Ketzner filed another claim for disability benefits on or about January 13, 2002 for " 'various orthopedic and neurological afflictions concerning her right hand.' " (*Ketzner v. John Hancock Mut. Life. Ins. Co.*, No. 99-4852(JWB) (D.N.J. Dec. 11, 2003).) She alleged that this disability began on the same date her purported psychiatric disability began-November 14, 1997. Despite the late notice of the claim, Appellees found Ketzner's condition satisfied the definition of "total disability" and they paid her retroactive benefits, with interest. Although there was some confusion regarding how Appellees paid the benefits, at this point it is undisputed that Ketzner was paid for all months from January 13, 1998 through present. The only payment Ketzner continues to contest is for the period before the chosen "begin date," *i.e.*, from November 14, 1997 through January 13, 1998.

II.

The procedural history of this litigation is extensive. Looking only at a sampling of the relevant end work-product of the District Court's labors, we note that Chief Judge Bissell filed no fewer than four orders in this matter, three of which were accompanied by thoroughly reasoned opinions, and Magistrate Judge Haneke has filed no fewer than three orders and one letter opinion. A thorough review of all the orders and opinions here would be unproductive. Instead, we will discuss each order and opinion that is specifically relevant to Ketzner's appeal as our review requires such.

III.

We exercise plenary review over the District Court's grant of summary judgment. *Abramson v. William Paterson College,* 260 F.3d 265, 276 (3d Cir.2001). To affirm the grant of summary judgment, we must be convinced that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law when the facts are viewed in the light most favorable to the nonmoving party. Fed.R.Civ.P. 56(c). We review the District Court's denial of leave to amend a complaint for abuse of discretion. *Lorenz v. CSX Corp.,* 1 F.3d 1406, 1413 (3d Cir.1993).

IV.

A. *Bad Faith Claim*

The District Court considered Ketzner's bad faith claim against Appellees in an opinion filed on March 5, 2003, ultimately granting summary judgment to

Appellees. The Court reconsidered the grant of summary judgment in its November 25, 2003 opinion and again found Ketzner's bad faith claim to be without merit, ultimately denying her motion for reconsideration. Both times the Court found that because Ketzner could not establish a right to summary judgment with respect to her claim for disability benefits, her disability claim was "fairly debatable" and, therefore, she had no sustainable bad faith claim against Appellees. We agree with the District Court's analysis and conclusion on this issue.

Under New Jersey law, to establish a claim for bad faith in the insurance context, a plaintiff must show two elements: (1) the insurer lacked a "fairly debatable" reason for its failure to pay a claim, and (2) the insurer knew or recklessly disregarded the lack of a reasonable basis for denying the claim. *Pickett v. Lloyds*, 131 N.J. 457, 621 A.2d 445, 454 (N.J.1993). To establish a bad faith claim, plaintiff must be able to establish, as a matter of law, a right to summary judgment on the substantive claim; if plaintiff cannot establish a right to summary judgment, the bad faith claim fails. *Id.* In other words, if there are material issues of disputed fact which would preclude summary judgment as a matter of law, an insured cannot maintain a cause of action for bad faith. *Id.; Tarsio v. Provident Ins. Co.*, 108 F.Supp.2d 397, 400-01 (D.N.J.2000); *Polizzi Meats, Inc. v. Aetna Life & Cas., Co.*, 931 F.Supp. 328, 335 (D.N.J.1996).

As the District Court noted, there were several competing medical reports about Ketzner's mental state and, even before the examinations by Drs. Gallina, there were many material issues of disputed fact. In short, we agree with the District Court that given the variety of inconsistencies within and among the medical reports, the time delays in processing Ketzner's claims because of miscommunications, and Ketzner's failure to produce

requested documents in a timely manner, "a reasonable juror could find that defendants reasonably denied Dr. Ketzner's claim for benefits." Plainly put, there is enough evidence on the record, even without further discovery or consideration of the examinations conducted by Drs. Gallina, to conclude that Ketzner's disability claim was fairly debatable. Ketzner's arguments that Drs. Gallina were not truly independent examiners, that their opinions lacked credibility, that they should not have been allowed to be characterized as expert witnesses for Appellees, and that Appellees violated state insurance laws and regulations with respect to keeping claims files do nothing to alter or refute this dispositive circumstance. Regarding the balance of Ketzner's arguments on this issue, regardless of whether they were all raised to the District Court as Appellees contest, to the extent they are based on denial of jury consideration, misapplication of *Pickett,* the law of other jurisdictions regarding bad faith claims, alternative approaches to bad faith claims under New Jersey law, constitutional rights to jury trials under both the United States and New Jersey constitutions, and insurance ethics, they are all similarly misplaced. None of these contentions persuasively refutes the evidence of record, adequately considered by the District Court on more than one occasion, or its conclusion that Ketzner's claim was fairly debatable before Drs. Gallina were ever involved. As a matter of law, under the controlling precedent of *Pickett,* Ketzner's bad faith cause of action is unsustainable and Appellees are entitled to summary judgment thereon.

B. *Malicious Abuse of Process and Post-Complaint Bad Faith Claims*

Ketzner argues that the District Court erred in denying her requests to amend her complaint to add claims for

malicious abuse of process and post-complaint bad faith. These claims are based on allegations that Appellees "sought irrelevant, invasive, and abusive discovery" and "blocked discovery of the witnesses who provided the sole factual predicate for [Appellees'] claims denial-Drs. Gallina-by designating them as trial expert witnesses after Dr. Ketzner subpoenaed their records and depositions." We believe that the District Court and the Magistrate Judge gave more than adequate consideration to these claims and we find that the District Court did not abuse its discretion in denying leave to amend the complaint to add them.

Magistrate Judge Haneke first entertained Ketzner's motion to amend to add these claims in a hearing on May 13, 2002. During the hearing, Magistrate Judge Haneke characterized the motion as an effort to disguise earlier allegations of wrongful defense that had been rejected and not appealed to the District Court, and he accused Ketzner's counsel of trying "to make a simple thing complex." Accordingly, he denied the motion on the grounds of bad faith and futility. After this decision, the District Court passed, twice, on renewed attempts by Ketzner to assert these claims or their substantial equivalents. In an opinion and order filed on March 6, 2003, the District Court denied Ketzner's appeal of Magistrate Judge Haneke's May 13, 2002 order. Specifically discussing the malicious abuse of process and post-complaint bad faith claims, the District Court found that they were merely relabeled claims for the wrongful defense claim that Magistrate Judge Haneke had already decided could not be added to the complaint in an April 24, 2000 order that had not been appealed. Discussing Ketzner's proposed amendments more generally, the Court noted that many of the claims were based on complaints concerning discovery practices by Appellees that Magistrate

Judge Haneke had authorized in rulings that were not timely appealed. The District Court revisited and affirmed its reasoning for denying leave to amend to add the post-complaint bad faith claim in its December 11, 2003 opinion.

As noted above, we review a denial of a motion for leave to amend a complaint for abuse of discretion. *Lorenz*, 1 F.3d at 1413. "Amendments, although liberally granted, rest within the sound discretion of the trial court." *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 125 (3d Cir.1983). On review of the record, we are satisfied that the District Court, and indeed the Magistrate Judge, were well within their discretion in denying Ketzner's motion to amend the complaint to add these claims. Furthermore, we agree with this conclusion insofar as these claims are, for all practical purposes, a repackaging of the wrongful defense claim that was previously denied by the Magistrate Judge and never directly appealed.

C. *RICO Claim*

Ketzner argues that the District Court erred in denying her motion to amend her complaint to assert a RICO claim. The District Court's error, she maintains, derives from the Magistrate Judge's error in originally denying the motion in reliance on a prior decision in a completely inapplicable case involving an ERISA claim.

In an order filed on April 22, 2003, Magistrate Judge Haneke denied for futility Ketzner's motion to amend the complaint to add a RICO claim. He explained that the amendment would be futile because it could not withstand a motion to dismiss and incorporated by reference his prior letter opinion in *Mark v. Unum Provident Corp.*, Civ. Action No. 00-3872(JAG), believing its reasoning to be applicable to his denial of Ketzner's

motion. (*Id.*) The District Court denied Ketzner's appeal of this decision in an order filed on December 16, 2003.

In the *Mark* letter opinion, the Magistrate Judge denied the plaintiff's motion for leave to amend to add ERISA and RICO claims in a case where plaintiff was suing Provident on a group long-term disability policy for unpaid benefits, a scenario very similar to the instant case. In denying leave to add the RICO claim, the Magistrate Judge stated that he believed its proposed addition was a transparent effort to circumvent the strictures of ERISA, which was designed to limit the available remedies for plaintiffs in that type of dispute, and that the defendant had met the burden of demonstrating the futility of the proposed amendment. Ketzner argues the Magistrate Judge's reliance on *Mark* was misplaced because Ketzner's case has nothing to do with ERISA and she did not delay in asserting the RICO claim.

Again, we review the District Court's denial of the motion for leave to amend under abuse of discretion. *Lorenz*, 1 F.3d at 1413. We understand Ketzner's argument that *Mark* involved an ERISA claim and her case plainly does not, and we agree that, to the extent the Magistrate Judge denied the RICO claim in *Mark* as an attempt to avoid the strictures of ERISA, that much of *Mark* is inapplicable. Nevertheless, we believe that the Magistrate Judge did explain his decision to deny leave to amend in both cases was based on the futility of the proposed amendments. While *Mark* may not be directly applicable, there, as here, the situation is ill-suited to a RICO claim. In both cases, the plaintiffs attempted to turn relatively weak bad faith claims regarding the processing of their own insurance claims (that were eventually paid) into a wholesale indictment of the way Provident processes all policy claims, grounded only in assertions that further discovery would justify their

vague allegations of some illegal scheme. Both the Magistrate Judge and the District Court were correct in refusing to endorse a fishing expedition to justify a RICO claim where the initial bad faith claim had already proven meritless. Because we would also disapprove of Ketzner's piscatory endeavors, we conclude that the District Court did not abuse its discretion denying her appeal of the Magistrate Judge's denial of her motion to amend the complaint to add a RICO claim.

D. *Declaratory Relief and Breach of Contract Claims*

Ketzner's final argument on appeal is that the District Court erred in granting summary judgment to Appellees on her breach of contract and declaratory judgment claims on the grounds they were moot. Ketzner contends that although she has been paid benefits for her orthopedic disability claim from January 13, 1998 onward, she has not been compensated for the period of November 14, 1997, when she made her first claim of mental disability, to January 13, 1998.

We are persuaded that the District Court's resolution of this issue in its December 11, 2003 opinion, by applying a 2 1/2-month overpayment to the disputed 2-month period of November 14, 1997 to January 13, 1998, was correct. Although Ketzner has continually asserted that she has not been paid for this period and that the District Court erred, she has not specifically contested the District Court's discussion of the 2 1/2-month overpayment or explained to us why this was wrong. Furthermore, we find nothing in the record that indicates that the District Court made an error in this determination. Accordingly, we find no genuine issue of material fact regarding the District Court's conclusion and, therefore, we affirm the District Court on this point.

V.

For the reasons stated above, we will AFFIRM the District Court's judgment on all counts.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4870

HELEN KETZNER, M.D.,

Appellant

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; PROVIDENT LIFE INSURANCE COMPANY

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil No. 99-cv-04852)
District Judge: Honorable John W. Bissell

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, and VAN ANTWERPEN, *Circuit Judges*, and YOHN*, *District Judge*.

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* Honorable William H. Yohn, Jr., Judge of the United States District Court for the Eastern District, sitting by designation; vote limited to panel rehearing only.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Marjorie O. Rendell

Circuit Judge

Dated: May 11, 2005
SLC/cc: Eugene R. Anderson, Esq.
Jonathan O. Bauer, Esq.
Robert F. Pawlowski, Esq.
Steven P. Del Mauro, Esq.
Peter J. Heck, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2021

RICHARD D. WEISS

Appellant

—v.—

FIRST UNUM LIFE INSURANCE COMPANY, A New York Corporation; LUCY E. BAIRD-STODDARD; J. HAROLD CHANDLER, as Chairman, President and Chief Executive Office of Unumprovident; GEORGE J. DIDONNA; KELLY M. SMITH; JOHN AND JANE DOES, 1-100

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 02-cv-04249)
District Judge: The Honorable Garrett E. Brown, Jr.

Argued June 9, 2005

Before: AMBRO, VAN ANTWERPEN and TASHIMA,*
Circuit Judges

(Filed June 14, 2005)

Gail M. Cookson, Esq.
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& Carpenter
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Morristown, New Jersey 07962
Counsel for Appellees

JUDGMENT ORDER

After consideration of all contentions raised by the parties, in their briefs and at oral argument on June 9, 2005, and the joint requests for a remand, it is

ADJUDGED and ORDERED as follows:

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* The Honorable A. Wallace Tashima, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

1.) The August 27, 2003, Order of the District Court dismissing Appellant's First Amended Complaint is VACATED;

2.) The February 13, 2004, Order of the District Court denying Appellant leave to file a Second-Amended Complaint is VACATED except with regard to Appellant's ERISA amendment;

3.) This case is REMANDED to the District Court for a determination of what effect the McCarran-Ferguson Act, specifically section 1012(b) of Title 15 of the United States Code, may have on the disposition of this case;

4.) In the event the McCarran-Ferguson Act does not prevent this case from proceeding, the District Court should consider allowing discovery and reviewing this matter again by way of summary judgment;

5.) The parties shall each pay their own costs on appeal; and

6.) This Court's jurisdiction is relinquished.

By the Court,

/s/ Franklin S. Van Antwerpen
United States Circuit Judge

DATED: June 14, 2005
CMH/cc: GMC, SPDM, PJH

Certified as a true copy and issued in lieu of a formal mandate on July 6, 2005

Teste: MARCIA M. WALDRON

Clerk, U.S. Court of Appeals for the Third Circuit.

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No. (1)

IN THE

Supreme Court of the United States

HELEN KETZNER, M.D.,

Petitioner,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
99-4852 (JWB)

Filed April 24, 2000

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Defendants.

ORDER

This matter having come before the Court by two motions of plaintiff to (1) amend the Complaint to include a claim for wrongful defense and (2) amend the Complaint to include a claim that the insurance policies at issue are "products"; and the Court having considered all papers submitted pursuant to Fed. R. Civ. P. 78, and good cause appearing;

It on this 24th day of April 2000

ORDERED that both of plaintiff's motions are hereby **DENIED**; and it is further

ORDERED that a copy of this Order be served upon all counsel of record within 7 days of the date of this order.

G. DONALD HANEKE

G. Donald Haneke
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
99-4852 (JWB)

Filed May 15, 2002

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

ORDER

This matter having come before the Court on Plaintiff's motion for leave to amend the Complaint to include claims for post-complaint bad faith, claims harassment, post-loss underwriting, repudiation of the insurance policy, disgorgement of profits, invasion of privacy, malicious abuse of process, and opportunistic breach of the insurance contract, and the Court having considered all papers submitted and having heard oral argument of counsel, and good cause appearing;

It on this 13th day of May 2002,

ORDERED, that the Plaintiff's motion to file an Amended Complaint to include claims for post-complaint bad faith, claims harassment, post-loss underwriting, repudiation of the insurance policy, invasion of privacy, malicious abuse of process, and opportunistic breach of the insurance contract, is **DENIED** on the grounds of bad faith and futility; and it is further

ORDERED, that a copy of this Order be served upon all counsel within five (5) days from receipt by movant's counsel.

G. DONALD HANEKE
G. Donald Haneke
United States Magistrate Judge

Case: 2:99-cv-04852 b1

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

Filed March 6, 2003

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It on this 5th day of March, 2003,

ORDERED that plaintiff's appeal from Magistrate Judge Haneke's Order of May 13, 2002 be, and it hereby is, denied.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

OPINION

APPEARANCES:

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(Attorneys for Defendants)

BISSELL, *Chief Judge*

Dr. Helen Ketzner has moved to amend her Complaint in light of what she considers is defendants' "bad faith litigation conduct." (Plaintiff's Br. at 2). Dr. Ketzner complains primarily of defendants' discovery pursuits which requested what she considers irrelevant information regarding physical ailments that are not related to the psychiatric disabilities that she originally claimed. Secondly, Dr. Ketzner argues that defendants, in bad faith, labeled Drs. Nancy and David Gallina as experts in order to block discovery with respect to these witnesses. Finally, Dr. Ketzner argues that defendants had a duty to disclose that the disability insurance coverage was potentially applicable for Dr. Ketzner's hand injuries for which defendants ultimately deemed Dr. Ketzner disabled.

Dr. Ketzner sought to add the following claims: (1) post-complaint bad faith; (2) claims harassment; (3) post-loss underwriting; (4) repudiation for the insurance contract; (5) invasion of privacy; (6) malicious abuse of process; and (7) opportunistic breach of contract. There are already nine claims pleaded in a very comprehensive Complaint; these seven would be added per the proposed amendment. Magistrate Judge Haneke denied the amendments on the grounds of bad faith and futility. (*See* Magistrate Judge Haneke's Order dated May 13, 2002).

None of these proposed additional claims, however, provide Dr. Ketzner with avenues for recourse that have not been (a) previously introduced, (b) rejected by Magistrate Judge Haneke and (c) not timely appealed to this Court. With respect to the post-complaint bad faith and the invasion of privacy claims, Dr. Ketzner argues that the extensive discovery requests prompted these claims. Yet, these were discovery requests that Magistrate Judge Haneke approved and Dr. Ketzner decided not to appeal.

During the hearing concerning the underlying motion, Magistrate Judge Haneke asked: "[I]sn't what you're trying to do with basing an amended complaint on alleged discovery abuses, which in effect, were found not to be abuses by the Court's rulings, isn't that a very circuitous way, belatedly, of attacking the earlier discovery rulings?" (Tr. at 4, lns. 21-24). Dr. Ketzner's counsel responded that "[he did not] believe that [Magistrate Judge Haneke] reviewed each and every one of [the discovery requests] and determined the propriety of each and every one of them." (*Id.* at 5, lines 5-7). Challenging Dr. Ketzner's counsel's belief, Magistrate Judge Haneke stated that "I don't rule on discovery requests when they become the subject of a dispute without reading all of [the discovery requests]." (*Id.* at 5, lines 9-11).

Similarly, the claims for post-complaint bad faith and malicious abuse of process grounded on defendants' designation of Drs. Gallina as experts are attempts at rearguing past decisions that were not appealed to this Court. In fact, in 2000, Dr. Ketzner moved to amend the original Complaint to add a claim for wrongful defense, which Magistrate Judge Haneke denied, and for which no appeal was sought. These claims are merely relabeled claims for wrongful defense.

As for the claims harassment assertion, defendants argue that no such cause of action exists, and Dr. Ketzner provides neither a specific argument to support this claim nor differentiates it from the other proposed counts of post-complaint bad faith or invasion of privacy. Dr. Ketzner's proposed amended complaint alleges in its "claims harassment" count that defendants "maliciously abused the judicial discovery process" and "sought and obtained [irrelevant discovery]." (*See* Plaintiff's Proposed Am. Compl., ¶¶ 126-127). Like the previous claims, in particular, the invasion of privacy claim,

this count has effectively been rejected by Magistrate Judge Haneke without a timely appeal.

As for the post-loss underwriting, repudiation of the insurance contract and opportunistic breach of the insurance contract counts, these three counts allege the same wrongs, *i.e.*, "[Defendants] acted toward Dr. Ketzner with conscious disregard to Dr. Ketzner's rights, and with the intent to vex, injure, and annoy Dr. Ketzner as to constitute oppression, fraud, or malice, justifying punitive damages in an amount sufficient to punish [defendants]." (*See* Plaintiff's Proposed Am. Compl., ¶¶ 137, 142, 168). Unlike the other counts discussed above, these three counts do not allege specifically that the actions pertaining to these counts took place after Dr. Ketzner filed her original complaint. Nevertheless, these claims are sufficiently cast in surviving counts, namely, breach of fiduciary duty, conversion, negligent and intentional misrepresentation, and false statements regarding coverage.

Generally, leave to file an amended pleading "shall be freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Magistrate Judge Haneke ruled, however, that Dr. Ketzner's motion for leave to amend the Complaint was grounded on bad faith and futile, which warrant denial based on *Foman*.

Presently, this Court must determine whether Magistrate Judge Haneke's ruling was correct. This review is taken under a "clearly erroneous or contrary to law" standard. (*See* 28 U.S.C. 636(b)(1)(A); Fd. R. Civ. P. 72(a); *Cippalone v. Liggett Group, Inc.*, 785 F.2d 1108